IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Number.....

JAMES VAN GILDER,
Petitioner,

vs.

AMERICAN SURETY COMPANY,
OF NEW YORK, a New York Corporation,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS

The opinion of the Circuit Court of Appeals is reported in 115 Fed. (2d) 200 and also on page 72 of the record.

The findings of fact and conclusions of law of the Federal District Court are given in full at page 60 of the record.

JURISDICTION

The jurisdiction of this honorable court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347).

The judgment of the Circuit Court of Appeals was entered on November 6, 1940 (71).

ARGUMENT

The facts have been pleaded in the foregoing petition for the writ and are not here repeated.

1. Under the law of Michigan, does a breach of the official bond of a sheriff result from the escape of a judgment debtor arrested by such sheriff under capias ad satisfaciendum and at liberty under jail limits bond, and is the surety upon such official bond liable for the judgment recovered against the sheriff based upon such escape?

While there is no case in the Supreme Court of Michigan or any other court directly in point with this case, and therefore strictly speaking it is a case of first impression, nevertheless as is here demonstrated all of the pertinent authorities both in Michigan and elsewhere are in support of plaintiff's contention that the permitting of an escape by a judgment debtor results in a breach of the sheriff's official bond.

The general Michigan rule as to the liability of the sureties was not in dispute, i. e., that the surety upon the official bond of the sheriff is liable "to all persons unlawfully injured by nonfeasance, malfeasance or misfeasance perpetrated by the sheriff, virtute officii or colore officii".

Kosowsky v. Fidelity & Deposit Co., 245 Mich. 266. 222 N. W. 153.

The opinion of the Circuit Court of Appeals recognized that rule but held that inasmuch as the statute provided for the allowing of the debtor the freedom of the jail limits that he had not been guilty of any act which would result in a breach of the bond. It is submitted that in reaching that conclusion the court overlooked the basis for holding the sheriff liable under the Michigan law, and that its construction therefor is contrary to the law of Michigan, for the following reasons:

1. It is the established law of the state of Michigan that it is the duty of the sheriff after taking a judgment debtor into his custody under a writ of capias ad satisfaciendum, to restrain him until discharged according to law. Such is the mandate of the writ and statute.

2. While the statute does permit the judgment debtor

the liberties of the jail limits upon filing proper bond, nevertheless the sureties upon such bond must be satisfactory to the sheriff for whose benefit the bond is given.

Sec. 14733-36 *C. L. of Mich.*, 1929.

3. If, after the judgment debtor has been released to the jail limits, the sheriff becomes dissatisfied with the sureties, he may retake the judgment debtor and confine him in close custody until satisfactory bond is given.

Kruse v. Kingsbury, 102 Mich., 100
60 N. W., 443.

4. While the judgment creditor has the option upon the escape of the judgment debtor, of taking assignment of such bond, and the bond is therefore given for his protection as well as the sheriff, nevertheless the approval of the sureties upon the bond is left entirely to the sheriff, the Michigan law making no provision for notice thereof to the creditors nor right by him to object thereto.

5. The going without the jail limits of the judgment debtor without the assent of the creditor "shall be deemed an escape of such prisoner and the sheriff having charge of such jail shall be answerable therefor."

Sec. 14752 *C. L. of Mich.*, 1929.

6. Under the statute the Michigan court has held that the sheriff is liable to the judgment debtor for the escape even though the judgment debtor at the time thereof was at liberty under a jail limits bond.

Wilson and Co. v. Franz, 206 Mich. 581,
173 N. W. 541.

The Supreme Court in that case reaffirmed the rule which has always existed in the state of Michigan to the effect that upon the escape of a judgment debtor the creditor has the option of either taking an assignment of the jail limits bond and suing thereon or pro-

ceeding against the sheriff based upon such escape as was done in the case at bar.

7. By the enactment of such statute the state of Michigan adopted the common law rule, "In respect to escape of a prisoner confined to jail limits and the consequences of such escape."

Optner v. Bolger (6c.) 95 Fed. (2d) 241.

8. Such common law action of escape was predicated upon either the willful or negligent act of the sheriff. In either event is violation of his official duty.

9. Inasmuch as under the law of Michigan the sheriff was liable for such escape and inasmuch as such liability was predicated upon the failure of the sheriff to faithfully perform and execute his office, and inasmuch as such holding by the state court is binding upon the federal court, it follows that the federal court should have held that the condition of the sheriff's official bond had been preached.

Such was the holding of the district court (60). However the Circuit Court of Appeals apparently upheld respondent's contention to the effect that in order to impose liability upon his bondsman the sheriff must have been guilty of an overt act of nonfeasance. But, as above demonstrated, to so hold is to entirely disregard the basis of the liability of the sheriff under the Michigan statute.

The Circuit Court of Appeals is likewise in error in stating in its opinion that it was not contended that the sureties upon the jail limits bond were inadequate. As we pointed out to that court, if such were not the case, then this appeal would never have reached that court, and their liability would have long since been enforced under the suit instituted by the sheriff in July, 1939 (36).

However, in the action brought against the sheriff, liability was not predicated upon that ground but rather upon the escape of the judgment debtor for which under the Michigan law he is responsible.

Again the court is in error in its holding as to the discretion lodged in the sheriff under the Michigan law as to the approval of the sureties on the jail limits bond. As pointed out in our brief, such sureties must be satisfactory to the sheriff and he must continue to be satisfied with their financial condition. Otherwise he is entitled to retake the judgment debtor and confine him to close custody until bond with satisfactory sureties is posted. Such discretion is lodged in him under the Michigan law in keeping with the absolute liability imposed upon the sheriff for an escape of a judgment debtor in order that the sheriff may indemnify himself against such possibility.

Again the court is in error in its opinion stating that section 14752 of C. L. of 1929 is not to be read into the official bond of the sheriff, for it is the law of the state of Michigan the "sureties must be supposed to have had in view when they signed the bond, all duties which existing statutes imposed upon their principal."

Marquette County v. Ward, 50 Mich. 174, 177.

The Michigan court has never held as indicated by the opinion of the Circuit Court of Appeals that a judgment debtor within the jail limits is not in the custody of the sheriff. In various decisions cited in the opinion of the Court of Appeals there appear statements to the effect that the judgment debtor while at liberty under a jail limits bond is in the custody of the surety thereon. However, such statements were always made in discussing the liability of the surety upon the jail limits bond — not that of the sheriff, and the holding of those cases was that the liability of such sureties upon the jail limits bond was coterminus with that of the sheriff. All of those cases recognized the rule as is pointed out in the opinion of the Circuit Court of Appeals, that nothing but the act of God or enemies of the country will excuse the sheriff for an escape. That was the common law rule which was adopted by the state of Michigan. But the effect of the opinion of the Circuit Court of Appeals, unreversed, would be that while such

rule has been adopted so as to impose liability upon the sheriff, nevertheless the necessary result of such liability, breach of his official bond, did not follow. Such holding is not only illogical but opposed to all of the authority from all jurisdictions upon this direct question.

18 *Am. Jur.* page 372 et sequi, *Escape, Prison breaking and Rescue,* Sec. 31 et sequi.

"The escape of a prisoner from the custody of a sheriff or constable works a breach of a condition of the officer's official bond that he shall faithfully perform the duties of his office."

57 *C. M. Sheriffs and Constables,* Sec. 956.

"Where the sheriff suffers a prisoner to escape, this is a breach of his official bond."

Murfree on Sheriffs, Sec. 47a of Ch. 2a, citing *Lakin v. State ex rel.,* 89 Ind. 68.

"The officer and his sureties are liable for defaults arising out of the performance of his ministerial duties, which include those acts which the law authorizes him to perform, and which are considered to come within the scope of his office. The officer is not civilly liable for judicial acts. But he and sureties are liable for * * * an escape of prisoner,"

Citing *People v. Dikeman,* 3 Abb. App. Dec. (N. Y.) 520;
Pingrey on Suretyship and Guaranty, Sec. 325;

See also:

Murfree on Official Bonds, Sec. 693;
Sedgwick on Damages, Sec. 692i;
Arnold, Suretyship and Guaranty, Sec. 248;
Spencer on Suretyship, Sec. 264.

For a general statement of the liability of surety on

the sheriff's official bond see *South v. State of Maryland;* 18 Howard 396, 402, 15 L. Ed. 433, 435.

The Michigan court has held the surety upon the official bond of the sheriff liable for the escape of a prisoner arrested upon a capias ad respondendum. *McCallum v. Gebhardt,* 154 Mich. 504, 118 N. W. 16.

There is no distinction in principle between an escape of a prisoner arrested under a writ of capias ad respondendum and one arrested under a capias ad satisfaciendum. In either case, it is the duty of the sheriff to restrain such prisoner in accordance with the mandate of the writ and the statutes of the state, and his failure to do so necessarily constitutes neglect of official duty. The distinction between the remedy of the creditors under the two writs is solely one of procedure. That the legislature considered the permitting of an escape to constitute neglect of duty by the sheriff and breach of his official bond is evidence by the wording of the section relative to writs of capias ad respondendum (Sec. 14720 *C. L. of Michigan,* 1929) which provides:

> "If such execution be returned unsatisfied, in part or in whole, the same proceedings shall be had upon the official bond of such sheriff or other officer to collect such deficiency, *as in other cases of delinquency.*"

2. The Federal Court is bound by the interpretation given the Michigan statute by decisions of the Michigan Supreme Court and the holding of the Michigan courts to the effect that such liability upon the part of the sheriff is predicated on breach of his official duty.

A question of the law of Michigan being involved, the federal courts are bound not only by the Michigan statutes but by the interpretation given thereto by the state court. A late case enunciating that doctrine is *West v. American Telephone and Telegraph Company* (decided December 9, 1940 in the United States Supreme Court). As appears from the argument under the preceding heading, the basis for the liability of the sheriff for such escape is the failure of the sheriff to faithfully perform

and execute his office. The Supreme Court reaffirmed that rule in *Wilson and Co. v. Franz*, 206 Mich., 581, 173 N. W. 541. In the district court, petitioner relied upon the authority of that case. However the district court in its conclusions of law relied upon the fact that in the case brought against the sheriff and resulting in the judgment which forms the basis of the action at bar, the state court had imposed liability on the sheriff and predicated such liability upon breach of the official duty of the sheriff in permitting such escape. The district court held that the federal court was bound by such determination of the state court. In so holding we submit that he was absolutely correct.

3. The Circuit Court of Appeals in its opinion ignored the basis of the sheriff's liability under the Michigan statute which is breach of official duty in permitting the escape.

The opinion of the Circuit Court of Appeals entirely overlooks the basis of the judgment against the sheriff, i. e. breach of official duty in permitting the escape. As set out at length in the argument under the first heading such absolute liability is imposed upon the sheriff. By virtue of the statute he is deemed guilty of an escape. Both the state and federal court are in accord that Michigan, by enactment of such statute adopted the common law rule of escape. At the common law there were two types of escape, willful and negligent. It is not the claim in the case at bar that there was any willful act on the part of the sheriff, but it does follow that by virtue of the statute imposing liability upon him for a negligent act, that a breach of his official bond follows for the same constitutes nonfeasance in office, that is, the failure to perform an act which is required by the statute as part of his official duties.

Under the admitted rule the surety is liable for the result of such nonfeasance.

Kosowsky v. Fidelity and Deposit Co., 245 Mich., 266, 222 N. W. 153.

4. The opinion of the Circuit Court of Appeals is

in conflict with decisions of the Michigan Supreme Court which hold that Michigan by enacting this statute has adopted the common law action of escape, violation of which necessarily involved breach of official duty and constitutes nonfeasance in office.

The argument under this heading has been covered in the foregoing argument.

5. Although respondent, by executing as surety, the official bond of the sheriff undertook thereby to indemnify any person unlawfully injured by its principal's nonfeasance in office, nevertheless the effect of the decision of the Circuit Court of Appeals is to relieve such surety from liability for a judgment against its prinicpal although that judgment is predicated upon the nonfeasance of the sheriff in the performance of his official duties.

Briefly consider the logic of the holding of the Circuit Court of Appeals and its practical effect. Both court and counsel recognize that the sheriff is liable for the escape. Such liability is not predicated upon any personal act or obligation of the sheriff as an individual, but arises out of the performance of his official duties. To admit on the one hand that the sheriff is liable for such escape by virtue of the statute adopting such common law action, but to deny on the other hand that the necessary incidents of such liability resulting in a breach of his official bond and imposing liability upon the sureties thereon, is both inconsistent and illogical. The necessary result of such a holding unreversed, is that the sheriff is liable, but that while such liability arises out of his official duties and his failure to perform the same, nevertheless the surety upon his official bond is absolved from all liability.

We respectfully direct the court's attention to the fact that an important question of Michigan law is involved. That the decision of the Circuit Court of Appeals is contrary to the theory of the Michigan law as to the liability of the sheriff and the sureties upon his official bond as well as authorities from all other jurisdictions upon that question.

SUMMARY

Inasmuch as the federal court is bound to follow the state statutes and the interpretation placed thereon by the Supreme Court of the State of Michigan, and inasmuch as the sheriff is liable for the escape by virtue of the Michigan statute, and inasmuch as the Michigan court has held that by the enactment of such statute, Michigan has adopted the common law action of escape, and inasmuch as the common law action of escape is predicated either upon the willful or negligent failure of the sheriff to perform and execute the duties of his office, it follows therefore that the sheriff must be held to have been guilty of nonfeasance resulting in a breach of his official bond under the admitted rule and imposing liability upon the surety thereon.

Respectfully submitted,

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